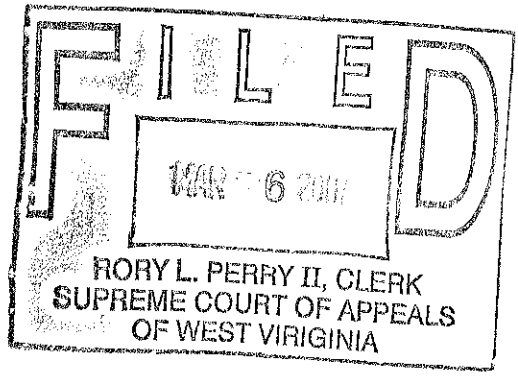
Nos. 32163 and 33296

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



AMANDA A. FRYMIER,

Appellant,

v.

HIGHER EDUCATION POLICY COMMISSION,
GLENVILLE STATE COLLEGE,

Appellee.

BRIEF OF APPELLANT AMANDA FRYMIER

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BRIEF OF APPELLANT OF AMANDA A. FRYMIER

I. STATEMENT OF THE CASE

This case presents a matter of first impression involving statutory interpretation of the rights of classified, nonexempt employees who work for state institutions of higher education. The questions focus on the role of seniority when there is a reduction of hours, pay and benefits for some, but not all, classified, nonexempt employees working within the same classification. More specifically, the Court is asked to address the question of whether and under what circumstances a state institution of higher learning may reduce the hours of some classified employees within a classification, while leaving the hours and wages of less senior employees unchanged.

This matter comes before this Court as consolidated appeals from two Orders of the

Circuit Court of Gilmer County: *Frymier v. Higher Education Policy Commission/ Glenville State College*, Civil Action No.03-P-14 (April 13, 2003) and *Frymier v. Higher Education Policy Commission/ Glenville State College*, Civil Action No.04-P-17 (June 4, 2006). The first, Civil Action No. 03-P-14, affirmed in part and remanded in part a Decision of the West Virginia Education and State Employees Grievance Board which denied Ms. Frymier's grievance based on the Grievance Board's interpretation of West Virginia Code § 18B-7-1(b) . The second, Civil Action No.04-P-17, is an appeal of the portion of the case that was remanded and addresses the issue of discrimination as defined by the grievance statute, West Virginia Code §29-6A-1 *et seq.* Although the Circuit Court opinions do address different legal issues, the cases are based upon the same incident and the same essentially uncontroverted facts.

Ms. Frymier has appealed both of the circuit court Orders which have now been consolidated by the Order of this Court dated January 23, 2007.

II. PROCEDURAL HISTORY

The event which precipitated this litigation was the reduction in work hours of some, but not all, classified employees of Glenville State College [hereinafter: the College]. This action, which was part of a cost saving plan, resulted in less senior employees continuing to work a full work week, while others in the same classification with more seniority had their hours cut. Appellant Amanda Frymier was one of the accounting assistants whose hours were reduced from a 1.0 Full Time Equivalent (FTE) position to a .87 FTE position while a less senior accounting assistant continued to work full time.

On June 3, 2003 Ms. Frymier filed a grievance pursuant to West Virginia Code § 29-6A-1 *et seq.* asserting that the reduction in force and substantial change in the terms and conditions of

her employment are governed by West Virginia Code § 18B-7-1. And, based upon that statute, senior employees within the same classification should have been given the opportunity to bump or bid on the positions of less senior employees whose position remained at 1.0 FTE. She further asserted that treating similarly situated employees, *i.e.* employees within the same pay grade and classification, differently was discriminatory. Her grievance was denied at levels I through III and Ms. Frymier appealed to the West Virginia Education and State Employees Grievance Board [hereinafter: the Grievance Board].

On November 5, 2003 the Grievance Board denied her grievance. The hearing examiner found that Ms. Frymier is clearly qualified for the position that remained full time, but a reduction in hours and pay does not constitute a reduction in force. The administrative law judge based her Decision on her interpretation of statute. That is, the provisions of West Virginia Code § 18B-7-1, which require reductions in force to be governed by seniority within classification, applies only to total (not partial) layoffs and terminations. Citing this Court's ruling in *Lucion v. McDowell County Board of Education*, 191 W.Va. 399, 446 S.E.2d 487 (1994), the ALJ stated: "[the College] acted within its discretion when it determined that it was in the school's best interest to curtail employee costs by reducing employment terms rather that eliminating positions."

On December 9, 2003, Ms. Frymier appealed this Decision to the Circuit Court of Gilmer County. On April 13, 2004 the circuit court issued its decision which denied the appeal in part and remanded in part. In affirming the Grievance Board's decision, the lower court concluded that W.Va. Code § 18B-7-1(b) is applicable to "reductions in work force effected by 'temporary

furlough or permanent termination'" but not to a reduction in hours. The court explained:

> The Appellant's complaint concerns a reduction in hours, and her argument that this amounts to a reduction in force while creative and perhaps true in a mathematical sense, appears to be defeated by the statutory language, which in this court's opinion concerns itself only with reductions in force carried out by actually eliminating personnel.

The court concluded: "[T]he bump provision of section (b) clearly is applicable only in layoff situations." On the issue of discriminatory treatment, the court ruled that Ms. Frymier had not exhausted her administrative remedies and remanded the case to Level IV for a ruling on the allegations of favoritism.

Subsequently, to preserve her appeal rights, Ms. Frymier appealed the denial based on W.Va. Code § 18B-7-1(b) to the West Virginia Supreme Court of Appeals. On January 18, 2005 the Court granted the Appellant's Motion to hold the Appeal in abeyance until the Circuit Court ruled upon the portion of the case that had been remanded.

The issues which were the subject of the remand were then heard and decided by Administrative Law Judge Sue Keller. Judge Keller found that Ms. Frymier, was similarly situated to Ms. Gifford, but the College provided a legitimate reason for the difference in treatment and Ms. Frymier did not allege the reason was pretextual. She concluded that the actions of Glenville State College did not constitute favoritism or discrimination as defined by W.Va. Code § 29-6A-1 *et seq.* because the actions of the College were based upon the actual job responsibilities of the employees and denied the grievance. .

On December 17, 2004 Ms. Frymier appealed that Decision to the Circuit Court of Gilmer County asserting that the hearing examiner failed to properly apply the holding in *Board of Education of the County of Tyler v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004) which

clarified the burden of proof in discrimination and favoritism cases brought pursuant to the grievance procedure. On June 4, 2006 the circuit court issued its Decision. The circuit court agreed that Ms. Gifford and Ms. Frymier were similarly situated, but found that the difference in treatment of Ms. Frymier and Ms. Gifford was based upon actual job responsibilities and affirmed the Grievance Board's ruling.

An Appeal to Civil Action No. 04-P-17 was filed and subsequently consolidated with the previous appeal, No. 32163 by Order of this Court.

III. STATEMENT OF FACTS

Amanda A. Frymier has been employed by Glenville State College since May 19, 1980. Beginning in July, 2000 she worked in the position of Accounting Assistant I, pay grade 12. Until July, 2003 her position was classified as 1.0 FTE. (full time equivalent), that is, she worked full time, 37 ½ hours per week with benefits based upon those hours.

In response to state mandated budget cuts, Glenville State College reduced the assignments of thirty-six employees from 1.0 FTE to .87 FTE. The positions slotted for reduction were identified by the College on the basis of need. Neither job performance nor seniority were factors in determining which positions were reduced to .87 FTE. In May 2003 Ms. Frymier was notified that as of July 1, 2003 several positions, including her's, were going to be reduced to .87 FTE. Her salary was reduced from approximately $30,114.00 to $26,000.00 per annum. Her sick days, seniority and other benefits were reduced proportionally.[1] Another Accounting Assistant I with less seniority, Mawana Gifford, was allowed to retain a 1.0 FTE, pay grade 12

[1] For example, for every one year of seniority accumulated by an employee whose position is designated 1.0 FTE, Ms Frymier acquires .87 of year seniority. Similarly, for every full day of leave accumulated by 1.0 FTE employees, Ms. Frymier now accumulates .87 days of sick leave.

position.

On June 3, 2003, Ms. Frymier filed a grievance pursuant to West Virginia Code § 29-6A-1, asserting that because she possessed greater seniority and was qualified for the Accounting Assistant I position as well as other full time, pay grade 12 positions which remained 1.0 FTE, she should have been allowed to bump into one of those positions.

The College explained that the reason the less senior Ms. Gifford retained a 1.0 FTE position was that, at the time the layoffs were announced, Ms. Gifford was performing the duties of cashier and the cashier's window needed to be open until the end of the normal work day. However, it is clear that Ms. Frymier is capable of performing the cashier duties performed by Ms. Gifford. This fact was among the unchallenged findings by the hearing examiner. The primary basis for this finding was that a few months before the layoffs Ms. Gifford abruptly left her employment with the College and Ms. Frymier worked the cashier's position. When Ms. Gifford returned to work, Ms. Frymier, unaware of the pending reductions, was asked what job she wanted and agreed to allow Ms. Gifford to return to the job Ms. Gifford had abandoned.

IV. ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF WEST VIRGINIA CODE §18B-7-1.

B. THE CIRCUIT COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS DECISION IN *LUCION v. MCDOWELL COUNTY BOARD OF EDUCATION*, 191 W.Va. 399, 446 S.E.2d 487 (1994).

C. THE CIRCUIT COURT ERRED IN ITS APPLICATION AND INTERPRETATION OF W.Va. CODE §29-6A-2 BY ALLOWING THE COLLEGE TO ASSIGN THE 1.0 FTE POSITION TO MS. GIFFORD AND REDUCE THE HOURS OF AN EQUALLY QUALIFIED EMPLOYEE, MS. FRYMIER.

V. POINTS AND AUTHORITIES

A. THE APPELLANT IS ENTITLED TO *DE NOVO* REVIEW.

Upon appeal, the scope of review of a state grievance board decision is limited to the five grounds enumerated in West Virginia Code §29-6A-7:

> (b) Either party or the director of the division of personnel may appeal to the circuit court of Kanawha County or to the circuit court of the county in which the grievance occurred on the grounds that the hearing examiner's decision:
>
> (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
> (2) Exceeds the hearing examiner's statutory authority;
> (3) Is the result of fraud or deceit;
> (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This Court has consistently ruled that "[A]lthough we accord great deference to the findings of fact of the West Virginia Education Employees Grievance Board, we review *de novo* questions of law." *McClung v. Bd. of Ed. of County of Nicholas,* 213 W.Va. 606, 584 S.E.2d 240 (2003) quoting *Maikotter v. Univ. of W.Va. Bd. of Trustees*, 206 W.Va. 691, 527 S.E.2d 802 (1999). Plenary review is conducted as to conclusions of law and application of law to facts, which are reviewed *de novo. Richards v. West Virginia Dept. of Health and Human Resources,* 213 W.Va. 304, 582 S.E.2d 751 (2003). *Accord, Durig v. Board of Educ. of County of Wetzel,* 215 W.Va. 244, 599 S.E.2d 667 (2004); *Putnam County Board of Educ. v. Andrews*, 198 W.Va. 403, 481 S.E.2d 498 (1998); *Martin v. Randolph County Board. of Educ.*, 195 W.Va. 297, 465 S.E.2d 399 (1995).

The question now before the Court is whether the actions of the College in reducing the

employment terms (pay and hours) of more senior employees while leaving similarly situated less senior employees in full time positions violated the provisions of West Virginia Code § 18B-7-1(b) and/or constituted discrimination as defined by West Virginia Code § 29-6A-2(d) and/or favoritism as defined by West Virginia Code § 29-6A-2(h). The primary issues in this instance do not hinge upon whether the Findings of Fact by the grievance board or circuit court are consistent with or are an acceptable interpretation of the evidence, but rather whether their interpretation and application of statutes is consistent with statutory language and legislative intent. Because the issues herein are primarily questions of law and application of law to the facts, these questions must be reviewed *de novo*

B. THE CIRCUIT ERRED IN FINDING THAT WEST VIRGINIA CODE §18B-7-1 APPLIES ONLY TO COMPLETE LOSS OF EMPLOYMENT.

1. WEST VIRGINIA CODE §18B-7-1(b) APPLIES TO ALL DECISIONS CONCERNING REDUCTIONS IN FORCE.

West Virginia Code §18B-7-1(b) provides in pertinent part:

> (b) **All decisions by the appropriate governing board, the commission or its agents at state institutions of higher education concerning reductions in work force of full-time classified personnel**, whether by temporary furlough or permanent termination, **shall be made in accordance with this section.** For layoffs by classification for reason of lack of funds or work, or abolition of position or material changes in duties or organization and for recall of employees laid off, **consideration shall be given to an employee's seniority** as measured by permanent employment in the service of the state system of higher education. In the event that the institution wishes to lay off a more senior employee, **the institution shall demonstrate that the senior employee cannot perform any other job duties held by less senior employees** of that institution in the same job class or any other equivalent or lower job class for which the senior employee is qualified.

(Emphasis added.)

The first sentence of this statutory provision clearly states that this legislative enactment applies to **all** decisions regarding reductions in force. Because the statutory language is clear and unambiguous, the terms all must be given their customary meaning. *In re Greg H.*, 208 W.Va. 756, 542 S.E.2d 919 (2000) (a statute is to be interpreted on the plain meaning of its provisions in the statutory context, informed when necessary by the policy that the statute was designed to serve); *In re* Tax Assessment Against American Bituminous Power Partners, L.P., 208 W.Va. 250, 539 S.E.2d 757 (2000) (in the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning). "All" is generally defined as meaning "each one of". Blacks Law Dictionary 48 (6th ed.1991). Therefore, the statute should be applied to each decision regarding reductions in force.

Although the statutory language clearly indicates that West Virginia Code § 18B-7-1(b) applies to **all** reductions in force, the circuit court ignored the plain meaning of the statute and concluded that the statute excludes partial furloughs or layoffs. It redefined "reduction in force" as "elimination of positions." This redefinition is unwarranted in that it is contrary to the plain meaning of the statute and is out of step with the statutory scheme for public employees.[2]

2. WEST VIRGINIA CODE § 18B-7-1 APPLIES TO A REDUCTION IN FORCE ACCOMPLISHED BY A REDUCTION IN WORK HOURS.

A reduction in force may be accomplished in several ways: abolition of positions; temporary layoff; full or partial layoffs; reduction in days worked' as in *Lucion v. McDowell*

[2] The notion that a furlough or layoff does not have to be a complete lack of work and may be partial (a reduction) is reflected in other statutes related to employment. For example, the regulations concerning unemployment compensation recognize partial unemployment. West Virginia Code § 21A-6-1 *et seq.*

County Board of Education, 191 W.Va. 399, 446 S.E.2d 487 (1994); or, as in this case, a reduction in the hours worked per day. In *Lucion*, the Board of Education had an option of reducing the total number of positions or reducing the contract terms. In either case, a reduction in force occurred. In that instance, the McDowell county employees experienced an 8% reduction in wages and hours. No employee was terminated. This Court recognized that a reduction in the number of work days was a reduction in force and statutory protections were applicable.

Similarly, a reduction in force may be accomplished, not by limiting the number of days worked, but by limiting the number of hours worked per day. The holding in *Lucion* indicates that the institution has discretion to determine how it wants to effect the reduction. And here, as in *Lucion*, the institution chose to reduce the employment terms rather than the actual number of employees. But, the College chose a slightly different path in that, unlike the McDowell County Board of Education, it chose to reduce the employment terms, not by reducing the number of days worked, but by reducing the number of hours employees worked per day. Employees at Glenville State College experienced a 13% decrease in wages and hours. The overall number of full time equivalent positions was reduced: a total of 36 1.0 FTE positions were reduced to the equivalent of 31.32 1.0 FTE positions. Although noone was terminated, there was a reduction in force. Because Ms. Frymier experienced a reduction in hours, the reduction in force procedures of West Virginia Code §18B-7-1 should be applied.

3. WEST VIRGINIA CODE §18B-7-1(b) REQUIRES THAT IN REDUCTIONS IN FORCE, CONSIDERATION BE GIVEN TO SENIORITY.

West Virginia Code §18B-7-1(b) further provides that all decisions concerning reduction "**shall** be made in accordance with this section" and "consideration **shall** be given to an employee's seniority." Because the operative language of the statute is "shall", the statute is to

be construed to mean "must" and requires that all decisions regarding reductions in force for full-time classified personnel be made in accordance with this section. *See, e.g., State ex rel. Cities of Charleston, Huntington v. West Virginia Economic Development Authority*, 214 W.Va. 277, 588 S.E.2d 655 (2003); *American Tower Corp. v. Common Council of City of Beckley,* 210 W.Va. 345, 557 S.E.2d 752 (2001); *State v. Allen*, 208 W.Va.144, 539 S.E.2d 887 (1999). Specifically, when reducing the work force, institutions of higher learning must give consideration to seniority and if, it intends to lay off a more senior employee, it must demonstrate that the more senior employee can not perform any other equivalent or lower job. Here, a change from a 1.0 FTE position to a .87 FTE position with a $4,000.00 per year reduction in salary and decrease in sick leave and vacation time is a material change and a represents a reduction in force. Because the operative word is shall, the College was required to consider seniority in making changes in job duties and reducing its work force. This mandatory requirement was ignored by the College.

4. THE STATUTORY INTERPRETATION OF THE CIRCUIT COURT IGNORES STATUTORY SCHEME DESIGNED TO PROVIDE EQUITABLE TREATMENT AND DUE PROCESS FOR PUBLIC EMPLOYEES.

In applying a statute, the legislative intent and context must be considered. *In re* Greg H., 208 W.Va. 756, 542 S.E.2d 919 (2000); *West Virginia Human Rights Comm'n v. Garretson*, 196 W.Va.118, 468 S.E.2d 802 (1996). Employees of institutions of higher education are public employees who have a constitutionally protected property interest in their employment which shields them from the arbitrary and capricious actions of their employers. *See, e.g., Trimble v. W.Va. Bd. of Directors*, 209 W.Va. 420, 549 S.E.2d 294 (2001); *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977).

West Virginia Code § 18B-7-1 and West Virginia Code § 29-6A-1 *et seq.* are parts of the

statutory scheme which codify and define the rights and protections of state college and university employees. By requiring reductions in force and recalls be governed by seniority, West Virginia Code § 18B-7-1 provides a mechanism for implementing a fair and non arbitrary and capricious procedure in the event an adverse employment action becomes necessary. West Virginia Code § 29-6A-1 *et seq.*, which proscribes discrimination and favoritism and provides a system for procedural due process, has a similar purpose. The legislative intent to treat similarly situated employees in a fair and equitable, non arbitrary manner is also reflected in West Virginia Code § 18B-9-1 *et seq.* which mandates a uniform classification and salary system for classified nonexempt employees.

In this instance the circuit court rulings frustrate this larger statutory scheme by opening the door to arbitrary actions in reductions in force by denying statutory protection to any employee who suffers less than a total loss of their property interest. Under the circuit court's interpretation an employee may suffer a 99% loss of employment, salary and benefits and not be protected by the seniority rights and anti discrimination and favoritism clauses conveyed by statutes. Failing to apply the statute because the reduction only affects 13% of a property interest is not only an impermissible interpretation of the statute, but sets in motion an unworkable system whereby an employee who suffers anything less than a total loss of employment is without statutory protection. The laws passed by the legislature were intended to infuse fairness into the system and create protection against the arbitrary and capricious actions of state employers. This ruling places the clear intent of the legislature to provide protection against favoritism in public employment in danger of becoming a shadow; the statute a sham with state jobs doled out and kept on the basis of who you know, not what you know.

5. IF THE STATUTORY LANGUAGE IS AMBIGUOUS, IT SHOULD BE INTERPRETED IN THE LIGHT MOST FAVORABLE TO THE EMPLOYEE.

If the statutory language is determined to be muddled and ambiguous, it should be interpreted in the light most favorable to the employee. See, *Clarke v. West Virginia Board of Regents*, 171 W.Va. 662, 301 S.E.2d 618 (1983); *Morgan v. Pizzino*, 163 W.Va. 454, 256 S.E.2d 592 (1979). In *Smith v. W. Va. Division of Rehabilatation Services*, 208 W.Va. 284, 540 S.E.2d 152 (2000), this Court held:

> We need not reiterate our discussions in those cases--except to point out again the well-established principle of West Virginia law that: . . . if statutory construction [of school and other public employee personnel laws] is necessary and warranted, such construction should go in the direction of expanding or preserving employee protection, and not in the direction of limiting that protection.

If there is any ambiguity in regards to whether the language in West Virginia Code § 18B-7-1 requires that all layoffs and terminations must be based upon considerations of seniority and that "all reductions in force" includes partial reductions or layoffs, that ambiguity must be resolved in favor of the employee.

C. THE CIRCUIT COURT ERRED IN ITS APPLICATION AND INTERPRETATION OF THE WEST VIRGINIA SUPREME COURT DECISION *LUCION v. MCDOWELL COUNTY BOARD OF EDUCATION*.

To the extent the circuit court relied upon this Court's Decision in *Lucion v. McDowell County Board of Education*, 191 W.Va. 399, 446 S.E.2d 487 (1994) to justify the College's failure to consider seniority as a criteria for its reduction in force decisions, the circuit court Order should be reversed. In *Lucion* this Court addressed the options available to a county board of education when seeking to reduce costs through a reduction in force. It concluded that a board

of education may either decrease the number of jobs (layoff employees) or modify the employment terms of existing jobs (decrease the number of days worked). However, if a school board decides to reduce employment terms for particular jobs, the board must first terminate existing contracts by following statutory procedures governing contract termination and then fill job vacancies by following statutory procedures. Those statutory procedures provide that layoffs and recalls must be made according to seniority. There, the school board chose to effectuate the reduction in force by reducing the terms of all service personnel jobs with 261 day contracts instead of eliminating positions. Because all employees within a classification were affected, the issue of seniority was not raised. *Lucion,* 191 W.Va. at 401 n.3, 404 n.12. Because all employees within the classification were treated similarly, the school board acted consistently with the statutes that required layoffs be determined by seniority.

Here, *Lucion's* applicability is limited because it did not address the issues raised by Ms. Frymier's grievance.[3] Although Ms. Frymeir agrees with the finding that the College has the flexibility to reduce employment terms, she reiterates that the reduction must be consistent with the statutory provisions of West Virginia Code § 18B-7-1(b) and be accomplished without favoritism or discrimination. To do otherwise is inconsistent with the holding in *Lucion.* Therefore, to the extent the circuit court and grievance board uses *Lucion* as a basis for justifying the College's failure to consider seniority when it reduced its work force, those decisions should be reversed.

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[3] Applying principles set forth in *Lucion*, the College could have terminated existing contracts covering the positions which were reduced, changed the job descriptions for those positions, and had the employees recalled by seniority or bid into the new positions.

D. THE CIRCUIT COURT ERRED IN ITS APPLICATION AND INTERPRETATION OF W.VA. CODE §29-6A-2 (d) AND (h) BY ALLOWING THE COLLEGE TO ASSIGN THE 1.0 FTE POSITION TO MS. GIFFORD AND REDUCE THE HOURS OF AN EQUALLY QUALIFIED EMPLOYEE, MS. FRYMIER.

1. WEST VIRGINIA CODE § 29-6A-2(d) AND § 29-6A-2(h) PROHIBIT DISCRIMINATION AND FAVORITISM.

West Virginia Code § 29-6A-2(d) states: "'Discrimination' means any difference in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." West Virginia Code § 29-6A-2(h) defines favoritism as: "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In *Board of Education of the County of Tyler v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004), this Court addressed the issue of discrimination and favoritism under the companion statute to West Virginia Code § 29-6A-1 *et seq.*, West Virginia Code § 18-29-1 *et seq.* and held:

> [T]o prevail in a claim for discrimination under W.Va. Code § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment. To the extent our prior cases are inconsistent with this holding, they are expressly overruled.

It should be noted that the definitions of favoritism and discrimination in the West Virginia § 29-6A-1 *et seq.* and § 18-29-1 *et seq.* are identical. And, the College, pursuant to West Virginia Code § 18B-9-4, like the county school boards, is under a statutory mandate to provide uniform salaries for those working within the same classification.

2. BY REDUCING THE HOURS OF MS. FRYMIER AND NOT THOSE OF MS. GIFFORD, THE COLLEGE TREATED SIMILARLY SITUATED EMPLOYEES IN A DISSIMILAR MANNER.

To establish a claim of discrimination or favoritism under W.Va. Code § 29-6A-2, an employee does not need to prove there was an intent to discriminate or that the discriminatory treatment was based upon membership in a protected class. An employee need only demonstrate that he or she was similarly situated to another employee, was treated differently and that the difference in treatment was not related to actual job responsibilities. Budgetary considerations can not be used as a rationale for discrimination and favoritism. *Board of Education of the County of Tyler v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004).

In order to determine whether favoritism or discrimination has occurred, the first step is to determine whether the employees are similarly situated. This is accomplished by comparing job responsibilities. To invoke the statutory provisions of uniformity, the job duties of compared individuals must be substantially similar, not identical. *See, Weimer-Godwin v. Board of Educ. of Upshur County,* 179 W.Va. 423, 369 S.E.2d 726 (1988); *Board of Educ. Of County of Wood v. Airhart,* 212 W.Va. 175, 569 S.E.2d 422 (2002). Here, the circuit court and as well as the grievance board found that Ms. Gifford and Ms. Frymier were similarly situated. They had identical job classifications. Ms. Frymier had performed the cashier's duties assigned to Ms. Gifford and had, prior to the announcement of the reduction in force, been given the choice of staying as cashier. It is uncontested that both employees were capable of performing the job duties that the College used as a basis for differentiating between them. And, it is uncontroverted that Ms. Gifford and Ms. Frymier were similarly situated.

3. THE LOWER COURT'S INTERPRETATION OF THE PHRASE "RELATED TO ACTUAL JOB RESPONSIBILITIES" IGNORES STATUTORY DEFINITIONS AND OPENS THE DOOR TO DISCRIMINATION AND FAVORITISM BASED UPON JOB ASSIGNMENTS.

The pivotal issue in this analysis is whether the disparate treatment of Ms. Gifford and Ms. Frymier was related to "actual job responsibilities" and, therefore, permitted under the statute. The circuit court's and grievance board's interpretation of the phrase "related to actual job responsibilities" ignores the definitions of job description and job title contained in West Virginia Code § 18B-9-2 and opens the door to discrimination and favoritism. "Actual job responsibilities"does not mean the job duties currently and arbitrarily assigned to affected employees. It refers to the duties required by the job. West Virginia Code § 18B-9-2(c) defines "Job description" as "the specific listing of duties and responsibilities as determined by the appropriate governing board or the commission and associated with a particular job title." "'Job title' means the name of the position or job as defined by the appropriate governing board or commission." West Virginia Code § 18B-9-2(d). Here, Ms. Frymier and Ms. Gifford had the same job title and job description. The duties listed in their job description for their job title were the same. It should be noted that neither Ms. Frymier nor Ms. Gifford had any right to a particular assignment within their classification.

The discriminatory treatment of Ms. Frymier and favoritism shown to Ms. Gifford resulted from the College's **job assignments** and was unrelated actual job responsibilities. The act of discrimination in this instance was not the decision to keep the job performed by Ms. Gifford a full time position, it is the decision to place and retain Ms. Gifford in a 1.0 FTE position while reducing the hours of Ms. Frymier when there was no basis related to the duties of

the job for doing so. Although the College did set forth a reasonable explanation for keeping the position full time, there was no job related reason for continuing to assign Ms. Gifford to that position.

Ms. Frymier does not challenge the reduction of hours of certain jobs or job slots as discriminatory. However, she asserts that the manner in which the College assigned employees to job slots with varying pay and benefits does constitute discrimination and favoritism and is arbitrary and capricious. In this instance, both Ms. Frymier and Ms. Gifford were in the same classification. It is uncontested that both Ms. Gifford and Ms. Frymier had the requisite skills to work at the cashier window during the required hours of operation. It is also clear that the college had the authority to change the assigned duties of its accounting assistants. There was no reason related to the actual responsibilities and duties of the job to favor Ms. Gifford over Ms. Frymier.

This situation is similar to the facts giving rise to the grievances that were decided in *Board of Education of the County of Tyler v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004) and *Durig v. Board of Educ. of County of Wetzel,* 215 W.Va. 244, 599 S.E.2d 667 (2004). In *Durig,* the Wetzel County Board of Education hired some mechanics under 240 day contracts and others under 261 day contracts. The circuit court and the grievance board found that the duties of the mechanics differed because there was more repair work required of the 261 calendar day employees and concluded that: (1) the employees were not similarly situated and (2) the favoritism provisions of West Virginia Code § 18-29-2 did not apply. On appeal, this Court reversed that decision and found that the mechanics performed substantially similar work and that the contracts of varying lengths violated the statutory mandates requiring equal treatment for employees performing like duties as well as the anti discrimination and favoritism provisions of

West Virginia Code § 18-29-2. Likewise in *Tyler*, the Court reversed a circuit court decision which held that executive secretaries who had differences in the duties they performed could be assigned to job duties with differing employment terms, salary, and benefits as long as it did so for non discriminatory reasons. This Court found that a finding that similarly situated employees with the same job description are treated differently supports a finding of discrimination and favoritism.

Here, neither Ms. Gifford nor Ms. Frymier had a "right" to a particular job assignment within their classification. The job duties assigned to Ms. Gifford could have been assigned to Ms. Frymier. Or, if Ms. Gifford's job was reduced to .87 FTE and Ms. Gifford left work before 4:00 p.m., Ms. Frymier could have worked the cashier window until closing. The actions of the College were not related to duties required by the job, but to its assignment of those job duties. In making those assignments, the College acted in a discriminatory manner toward Ms. Frymier and demonstrated favoritism toward Ms. Gifford.

VI. CONCLUSION

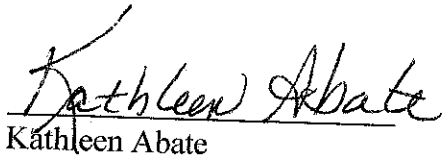
In this case Glenville State College sought to reduce costs by reducing the overall number of hours worked by its staff. It reduced the number of full time equivalent positions from 36 to the equivalent of 31.32. This included three of four full time Accounting Assistant I positions which were changed to .87 (FTE). Because this reduction constitutes a reduction in the work force, the provisions of West Virginia Code §18B-7-1(b) which require that reductions be made according to seniority should be applied. By failing to follow the guidelines set forth in the statute, the College acted in a discriminatory manner toward Ms. Frymier and showed favoritism to Ms. Gifford in violation of West Virginia Code § 29-6A-2(d) and § 29-6A-2(h).

The circuit court's interpretation of the statutory language similarly situated employees to be treated differently if the employees are given different job assignments, is contrary to the statutory scheme for equalizing treatment of similarly situated employees and ignores the fact that Ms. Frymier could perform the duties of the job in question. Arbitrarily assigning one of four equally qualified individuals within the same job classification to a full time position constitutes discrimination and favoritism. The College should not be allowed to frustrate the statutory scheme by arbitrarily choosing which employee should remain full time.

For the reasons discussed above, Ms. Frymier requests that she be awarded the full time position along with back pay and benefits as well as seniority. She further requests that she be awarded costs and attorney fees pursuant to West Virginia Code §29-6A-10 .

Respectfully submitted,

AMANDA A. FRYMIER,
Petitioner,
By counsel.



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CERTIFICATE OF SERVICE

I, Kathleen Abate, hereby certify that I served the foregoing "Brief on Behalf of Appellant Amanda A. Frymier" upon the Appellee by mailing a true copy thereof, by United States Mail, postage pre-paid, this 2nd day of March, 2007, in an envelope addressed as follows:

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